Opinion of the District Court

PRATT, D.J.

Plaintiff filed this complaint on September 13, 1973. (Docket Entry 1). The complaint alleges that the plaintiff has been discriminated against in her employment by certain federal officers. (Complaint at ¶¶ 8, 9, 10, 11 & 12). These discriminatory acts apparently occurred before September 24, 1971 since plaintiff filed a formal complaint with the defendant on that date. (Complaint at ¶ 3). After appeal to the Board of Appeals and Review on March 31, 1972 and an adverse decision of that body (Complaint at ¶ 6), plaintiff filed this suit. Plaintiff concedes that this civil action is brought pursuant to 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp.) (Complaint at ¶ 7), and that this section was enacted on March 24, 1972. (Complaint at ¶ 3).

Defendant moves to dismiss and for summary judgment. (Docket Entry 17). Defendant argues that sovereign immunity bars this suit since the alleged discrimination occurred prior to the enactment of 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp.) on March 24, 1972.

SOVEREIGN IMMUNITY

The Court determines that the doctrine of sovereign immunity bars this suit since the alleged discrimination of which the plaintiff complained to the United States Civil Service Commission occurred prior to the enactment of 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp.).

42 U. S. C. A. § 2000e-16 (1970-1972 Supp.), for the first time in the history of the Republic, explicitly permits a federal employee to sue her employer for alleged sexual discrimination. That provision was enacted on March 24, 1972. The issue the Court must decide is whether that

provision permits the institution of a civil suit for alleged discriminatory acts that occurred prior to the passage of the act but were not completely processed administratively until after the passage of the amendatory provision. The statute and the legislative history are silent on this precise issue; however two federal district courts have addressed themselves to it.

TITLE VII NOT RETROACTIVE

Freeman v. *Defense Construction Supply Center,* Civil No. 72-241 (S. D. Ohio, filed October 17, 1972) [5 EPD ¶ 8526], held that the 1972 amendment only applied to personnel action occurring after the amendments and not to personnel actions occurring prior to the enactment of the amendments. *Mosley* v. *United States,* Civil No. 72-380-S (S. D. Calif., filed January 23, 1973) [6 EPD ¶ 8875], also held that the 1972 amendments do not apply to personnel actions occurring prior to the enactment of the amendments and that the amendments are not retroactive. Thus, the only case authority presented to the Court on this issue suggests that the defendant is entitled to a dismissal of the civil action for want of subject matter jurisdiction.

Underlying policy and judicial principles also counsel the dismissal of this civil action for want of subject matter jurisdiction. As previously noted, neither the language nor legislative history of Section 2000e-16 addresses itself to the issue of the retroactivity of the section. *United States* v. *Sherwood,* 312 U. S. 548 (1941), teaches, however, that waivers of sovereign immunity should be strictly construed. Thus, *Sherwood* suggests by analogy that any doubts concerning the scope of Section 2000e-16 should be decided in favor of prospective application only.

Another doctrine suggests that any question of the scope of Section 2000e-16 should be decided *in favor of only* prospective application. *Hassett* v. *Welch*, 303 U. S. 303 (1938), establishes the principle that statutes are held to be the prospective in application unless the Congress indicates otherwise. There is no indication that Congress intended Section 2000e-16 to apply retroactively to alleged discrimination that occurred before March 24, 1972. Therefore, the presumption is once again that Congress only intended Section 2000e-16 to apply to discriminatory acts that occurred after March 24, 1972.

The principles of statutory construction mentioned above apply when the text and legislative history of the statute is neutral on the question of the retroactive application of the statute. If any inference can be drawn from the present statutory scheme, it is that Congress did not intend Section 2000e-16 to apply to discriminatory acts that occurred prior to March 24, 1972. Section 2000e-16 was Section 11 of Public Law 92-261. Section 14 of Public Law 92-261 provided that amendments made by the act to Section 706 (that section dealing with the power of the Commission to prevent unlawful employment practices) were applicable to both pending and future charges. Thus, Congress dealt with the problem of retroactivity when it felt that retroactive application of the amendments was necessary. Absence of language similar to Section 14 in Section 11 suggests that Congress did not feel that such retroactive application was merited. It would be most improper for a court to overturn this congressional determination of the importance of retroactivity.

CONTINUING BIAS CLAIM

Plaintiff still maintains that the doctrine of sovereign immunity is inapplicable to her Section 2000e-16 claim. Plaintiff argues that the complaint is aimed at the continuing policy of sexual discrimination within the Food and Drug Administration even though acts prior to March 24, 1972 are utilized as evidence to support this conclusion. Plaintiff cites numerous cases, including *United States* v. *Bethlehem Steel Corp.*, [3 EPD ¶ 8257] 446 F. 2d 652 (2d Cir. 1971); *United States* v. *Sheet Metal Workers Union 36*, [2 EPD ¶ 10,083] 416 F. 2d 123 (8th Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, [1 EPD ¶ 9843] 279 F. Supp. 505 (E. D. Va. 1968); *Williams* v. *St. Gobain Corp.*, 447 F. 2d 561 (10th Cir. 1971); *United States* v. *Electrical Workers No. 38*, [2 EPD ¶ 10,242] 428 F. 2d 144 (6th Cir. 1970), cert. den. 400 U. S. 943 (1970); *Culpepper* v. *Reynolds Metals Co.*, [2 EPD ¶ 10,138] 421 F. 2d 888 (5th Cir. 1970); *Griggs* v. *Duke Power Co.*, [3 EPD ¶8137] 401 U. S. 424 (1970); and *United States* v. *Carpenters Local 169*, [4 EPD ¶ 7610] 457 F. 2d 210 (7th Cir. 1972), for the proposition that the present consequences of past discrimination are covered by the Civil Rights Act of 1964. The Court recognizes this principle. The plaintiff, however, objects in her complaint to the past consequences of past discrimination. The acts and consequences of sexual discrimination of which plaintiff complains in her complaint occurred prior to September 24, 1971. (Complaint at 5). Plaintiff has never presented the claims allegedly occurring subsequent to the enactment of the 1972 amendments to the Food and Drug Administration as is required by 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp. Pamphlet). (Complaint at ¶ 12). This is not a case where an employee claims that an employment prac-

tice neutral on its face is utilized after the passage of the Act to continue a practice of discrimination enforced prior to the passage of the Act; rather, this is a case where both the allegedly neutral employment practice and the preceding discriminatory act occurs prior to the passage of the 1972 amendments. None of the above cited cases stand for the proposition that the 1972 amendments erase the defense of sovereign immunity when the plaintiff has not exhausted her administrative remedies with respect to practices occurring after the passage of the amendments.

EXECUTIVE ORDER 11478

Plaintiff asserts as another jurisdictional ground for her complaint (besides Section 2000e-16), Executive Order 11478. Plaintiff cites *Chambers* v. *United States* [4 EPD ¶ 7538] 451 F. 2d 1045 (Ct. Cls. 1971), for the proposition that this Court has subject matter jurisdiction pursuant to that Executive Order to compel federal agents to comply with the policy of equal employment opportunities of the 1964 Civil Rights Act. A simple answer to plaintiff's argument is that her entire complaint is premised upon 42 U. S. C. A. § 2000e-16 (1970-1972 Supp. Pam.) as providing the Court with subject matter jurisdiction and a claim for which relief can be granted. (Complaint at ¶¶ 3 and 7). Another simple answer is that *Chambers,* a case involving a discriminatory refusal to hire, distinguished refusal to promote cases such as the present case and *Gnotta* v. *United States,* [2 EPD ¶ 10,078] 415 F. 2d 1271 (8th Cir. 1969), cert. den. [2 EPD ¶ 10,178] 397 U. S. 934 (1970), from its holding and that *Chambers* was based in part on the Court of Claim's unique power over federal employment claims, 451 F. 2d at 1052. The more appropriate and compelling

answer, however, is that *Gnotta* is more persuasive than *Chambers* on any point that those cases may be in conflict concerning subject matter jurisdiction. Mr. Gnotta filed a civil action in district court alleging that his federal employer had denied him a promotion because of his Italian ancestry. The Circuit Court, through Judge (now Justice) Blackmun, affirmed the dismissal of the complaint for want of subject matter jurisdiction even though the plaintiff relied upon an executive order similar to the one in the present case to provide the court with subject matter jurisdiction:

> [W]e adopt Judge Oliver's comments:
>
> "The plaintiff does not allege that his alleged cause of action was created or authorized by any particular provision or section of the Constitution, Act of Congress, [or] regulation of any executive department. Nor does he allege what sort of an express or implied contract he attempts to base his claim. None of the executive orders or regulations which the complaint cites purports to confer any right on an employee of the United States to institute a civil action for damages against the United States, in the event of their violation, even if it should be established that plaintiff's failure to have been promoted as an employee of the Corps of Engineers was in fact due to discrimination in violation of the Executive Orders pleaded. Congress has complete power either to create or to refuse to create such a remedy. It did not authorize civil actions for damages under any of the laws (including the Executive Orders and regulations) applicable to facts pleaded by plaintiff in this case."

415 F. 2d at 1278.

It was no doubt partly in response to *Gnotta* that Congress enacted the 1972 amendments so that federal employees could have judicial redress for discriminatory acts occurring after March 24, 1972. (Cramton, Nonstatutory Review of Federal Administrative Action—The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 391 (1970). Absent an explicit command from Congress that the amendments apply to discriminatory acts and consequences that occurred prior to the enactment of the amendments, *Gnotta* mandates that this Court lacks subject matter jurisdiction over any claim, be it premised on Section 2000e-16 or on inherent judicial authority.

"Unconstitutional" Acts of Officials

Plaintiff also argues that the doctrine of sovereign immunity is inapplicable since the suit is against an officer exercising his powers in an unconstitutional manner, *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682 (1949). The complaint contains no allegation that defendants' actions were unconstitutional; rather, the allegation is that the alleged acts violated the amendments to the Civil Rights Act of 1964 for which plaintiff is suing the head of the employing agency as is required by 42 U. S. C. A. § 2000e-16(c). The only suggestion that the FDA made on unconstitutional use of its powers appears in plaintiff's brief. Even then she alleges that the FDA's unconstitutional use of power is a matter of proof. (Brief at 9). Furthermore, this argument was rejected in *Gnotta* since the decision to promote directly affects the Treasury and involves administrative discretion in the sensitive area of personnel administration:

> "These principles, we feel, operate to identify the first and second counts against the named individuals with counts against the United States, for relief under the counts would compel those individuals to promote the plaintiff, with the natural effect a promotion has upon the Treasury, and to exercise administrative discretion in an official personnel area. This obviously is not a case which concerns either of the exceptions recognized . . . namely, where the officer's act is beyond his statutory power or where, although the action is within the scope of his authority, the power, or the manner of its exercise, is constitutionally void."

415 F. 2d at 1277.

The Court declines to follow *Penn* v. *United States,* [5 EPD § 8404] 350 F. Supp. 752, 755 (M. D. Ala. 1972) and cannot agree with the distinctions of *Gnotta* made therein. *Gnotta* did not evaluate the merits of the claim. The Court in *Gnotta* assumed plaintiff could prove that he was discriminated against because of ancestry, 415 F. 2d at 1276. *Gnotta* held that the supervisor discretion necessary for departmental promotion foreclosed the allegation that the discretion was exercised unconstitutionally, 415 F. 2d at 1276. (The Court does note, however, that any contradiction between *Penn* and *Gnotta* will be minimized by Section 2000e-16 since Courts will not have to engage in contortions of the *Larson* doctrine in order to redress egregious acts of discrimination occurring after March 24, 1972).

Ogletree v. *McNamara,* [4 EPD ¶ 7510] 449 F. 2d at 93 (6th Cir. 1971), also counsels against the adoption of the *Penn* rationale. *Ogletree* was a civil action by federal Negro employees of the Wright Patterson Air Force Base that

alleged systematic racial discrimination in the merit promotion program. The Court held that *Gnotta* precluded the suit against the individual defendants:

> "The operation of our defense establishments is, of course, close to the core of the concept of sovereign immunity. Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 704, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that defendants are all named as individuals does not change the result. *Larsen* v. *Domestic & Foreign Corp., supra; Dugan* v. *Rank,* 372 U. S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *Hawaii* v. *Gorden,* 373 U. S. 57, 83 S. Ct. 1052. 10 L. Ed. 2d 191 (1963)."

449 F. 2d at 100.

Ogletree provided, however, that the plaintiffs could seek judicial review of complaints specifically alleging exhaustion of administrative remedies, see also *Beale* v. *Blount,* 461 F. 2d 1133 (5th Cir. 1972). *Virgil* v. *Post Office Dept.,* 406 F. 2d 921 (10th Cir. 1969), limits that judicial review to a determination of whether the procedural requirements of the statutes and regulations were complied with and whether the action of the department officials was arbitrary or capricious or not supported by substantial evidence.

Dismissal of Action

Ogletree and *Gnotta* therefore mandate that this civil action be dismissed without prejudice for lack of subject

matter jurisdiction. Since the dismissal is without prejudice, plaintiff is not precluded from seeking judicial review of final administrative action as is permitted by *Ogletree*.

It Is So Ordered.

Opinion of the Sixth Circuit Court of Appeals

CONTIE, *D.J.*:

The plaintiff-appellant, a female employed in the Pure Food and Drug Administration, filed a complaint in Federal District Court on September 13, 1972, alleging she was discriminated against because of her sex in the following respects:

(a) Her request for promotion had not been acted upon as rapidly as those of men similarly situated;

(b) She was being denied administrative leave of compensatory time for attending graduate level classes for job-related training while men similarly situated were granted such time;

(c) She was being denied compensatory leave or overtime pay for work accomplished outside of official duty hours while men similarly situated were granted such time; and

(d) She was unable to obtain details within her agency for the purpose of on-the-job training and for the purpose of advancement, although male employees had obtained such information.

Previously, plaintiff-appellant had filed a formal complaint with defendant-appellee Equal Employment Opportunities Commission (hereinafter E.E.O.C. or defendant-appellee) on September 24, 1971. Said administrative complaint was denied for failing to show discrimination. An appeal was taken to the Board of Appeals and Review, which affirmed the findings of the E.E.O.C., said affirmation being made

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* The Honorable Leroy J. Contie, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

after the date of the adoption of Title 42 U.S.C. 2000e-16(c). Plaintiff thereafter filed the instant cause of action in District Court.

Plaintiff-appellant assets that her federal court action is brought pursuant to Title 42 U.S.C. 2000e-16(c) which was enacted March 24, 1972, approximately six months after the filing of the formal administrative complaint. The United States District Court was thus confronted with a complaint filed after the enactment of 2000e-16(c), but resulting from a formal administrative complaint which was filed before said enactment.

RETROACTIVITY OF TITLE VII

It is the claim of the plaintiff appellant that jurisdiction of the federal court claim is based upon Title 42 U.S.C. 2000e-16(c) and/or on Executive Order 11478.

Defendant-appellee, asserting that the federal court did not have jurisdiction under either 2000e-16(c) or the Executive Order, filed a motion to dismiss or in the alternative for summary judgment in the district court. On July 5, 1973, the United States District Court sustained defendant-appellee's motion for summary judgment. The District Court determined that the defense of sovereign immunity was applicable and that Title 42 U.S.C. 2000 e-16(c) did not apply retroactively. The Court further found that Executive Order 11478 did not give plaintiff-appellant subject matter jurisdiction. In argument before this Court plaintiff-appellant contends that Title 42 U.S.C. 2000e-16(c) should be applied retroactively.

The District Court characterized Title 42 U.S.C. 2000 e-16(c) as the creation of new rights formerly barred under the doctrine of sovereign immunity. Plaintiff-appellant asserts that in view of the facts that the E.E.O. Act of

1972 does not contain a statement as to how said Act should be applied and since the purpose of the Act is remedial in nature, said Act should therefore be given retroactive effect. In the alternative, plaintiff-appellant contends that the District Court has jurisdiction of her claim by reason of the Civil Rights Act of 1964. In support of this alternative claim the plaintiff-appellant cites the case of *Davis* v. *Washington*, [5 EPD ¶ 8088] 352 F.Supp. 187 (Dist. Ct. D.C. 1972).

This Court first notes that the Civil Rights Act of 1964 did not grant the courts jurisdiction over litigation involving federal employees.

Further, the *Davis* case is totally distinguishable. In that case the District Court for the District of Columbia was attempting to determine whether a police force promotional test was discriminatory in effect. The court therein stated that:

"While strictly speaking, the claims raised here by plaintiffs against these governmental employers were not governed by Title VII of the 1964 Civil Rights Act until it was recently amended[1], the Court, as the parties basically agree, looks to the Act . . . for guidance as to the constitutional constraints on a public employer."

We agree that the claims raised by plaintiff-appellant are not governed by Title VII of the Civil Rights Act of 1964.

We also agree that the *Davis* case does not stand for the proposition that Title VII grants federal courts jurisdiction in sex discrimination cases. A careful reading of that case indicates that the court therein did not find jurisdiction under either Title VII of the Civil Rights Act or the E.E.O.

[1] Equal Employment Opportunity Act of 1972, Pub.L. No. 86 Stat. 103 (March 24, 1972).

Act of 1972. Rather, that court determined that having taken jurisdiction, it would look to the above mentioned acts for guidance and guidelines. *Davis* v. *Washington, supra,* at 191. Thus, we conclude that the *Davis* case is distinguishable and that the District Court does not have jurisdiction of plaintiff-appellant's claim under the Civil Rights Act.

Turning to the issues of sovereign immunity and the retroactive application of the E.E.O. Act of 1972, this Court is convinced that the District Court properly granted defendant-appellee's motion for summary judgment on the grounds of the applicability of the doctrine of sovereign immunity. The law in this area is clear.

Waivers of sovereign immunity must be strictly construed. *United States* v. *Sherwood,* 312 U.S. 584, 61 S.Ct. 767 (1941). Furthermore, a law is presumed to operate prospectively unless there is a clear expression to the contrary. *Hassett* v. *Welch,* 303 U.S. 303, 58 S.Ct. 559 (1938). An examination of Section 14 and Section 11 of the E.E.O. Act of 1972 indicates that Congress provided that said Act "shall be applicable in regard to charges pending before the Commission." Thus, Congress clearly intended certain portions of the Act to operate retroactively and so indicated. We therefore conclude that by its silence as to other sections Congress intended such sections to have prospective application only. In support of this conclusion we note that the District Court relied upon *Mosley* v. *United States,* Civil 72-380-S (January 4, 1973 S.D. Calif.) [6 EPD ¶ 8875] and *Freeman* v. *Defense Construction Supply Center,* C 72-241 (S.D. Ohio Filed October 17, 1972) [5 EPD ¶ 8526] in which the Act was held not to apply retroactively. We are convinced that this conclusion is sound.

The plaintiff-appellant relies upon *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) [5 EPD ¶ 8594] wherein the Court stated that the 1972 Act was remedial and amendatory and that the Act should be construed to cover pending charges of discrimination in federal employment. The District Court in the *Walker* case further stated that said Act takes away no substantive right, but merely changes the tribunal that is to hear the case. However, this Court cannot agree with this conclusion. See *Freeman* v. *Defense Construction Supply Center, supra; Johnson* v. *Froehlke*, C.A. 72-677(H), (D. Md. Jan. 4, 1973) [5 EPD ¶ 8638].

ADMINISTRATIVE REMEDIES

The District Court in the instant case further determined that the plaintiff-appellant had not exhausted her administrative remedies relative to acts which occurred after the enactment of Title 42 U.S.C. 2000 e-16(c) and that, therefore, plaintiff-appellant's action was barred by reason of her failure to exhaust her administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938). Plaintiff-appellant asserts that the requirement of exhaustion of administrative remedies should not apply when the exercise of such remedies would be futile. *Ogletree* v. *McNamara*, [4 EPD ¶ 7510] 449 F.2d 93 (C.A. 6 1971). In support of this argument, plaintiff-appellant contends that her claim is one of continuing discrimination and that the issues already presented to the EEOC are "nearly" identical. Therefore, she concludes that the futility principle of *Ogletree* is applicable.

However, this Court is of the opinion that by the statement in the complaint alone, it must be assumed there are new acts of discrimination. Such new acts may be similar

in nature, but could hardly be precisely identical in all respects. A claimant cannot avoid a requirement of the Act by the self-serving determination that the new facts are similar to prior alleged discriminatory acts, and that accordingly the same result would excuse her from administrative review. The facts as alleged by the plaintiff-appellant in her brief are not identical but, in her own words, are "nearly identical".

The plaintiff-appellant relies upon *Griggs* v. *Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424, 91 S.Ct. 849 (1970), to buttress her argument that the alleged acts are continuing violations and therefore are exempt from administrative procedures. The *Griggs* case is clearly distinguishable in that it does not involve sovereign immunity and was decided March 8, 1971. Further, said case was based upon acts of a private employer and the violation of Title VII of the Civil Rights Act of 1964. See *United States* v. *Carpenters Local 169*, [5 EPD ¶ 8030] 457 F.2d 210 (C.A. 7 1972), and *United States* v. *Virginia Electrical and Power*, [3 EPD ¶ 8207] 327 F.Supp. 1034 (E.D. Va. 1971). These cases do not relate to the issue of sovereign immunity prior to the 1972 enactment of the E.E.O. Act.

Executive Order 11478

Plaintiff-appellant's final contention is that Executive Order 11478 confers subject matter jurisdiction on the District Court. However, we conclude that said Executive Order does not contemplate judicial review. In the case of *Gnotta* v. *United States*, [2 EPD ¶ 10,078] 415 F.2d 1271 (C.A. 8 1969), which was cited by this Court in *Ogletree, supra*, Judge (now Justice) Blackman ruled that Executive Orders 11246 and 10925, the predecessors of 11478, did not provide for a judicial review by civil action. The plaintiff-appellant however relies upon *Chambers* v. *United States*,

[4 EPD ¶7538] 451 F.2d 1045 (U.S.Ct.Cl. 1971), in which the court therein concluded that inasmuch as Congress did not exclude a judicial review, one should have been contemplated.

It must be unequivocally stated that *Gnotta* and *Chambers* are irreconcilably in conflict. The Court has difficulty in applying the *Chambers* reasoning that by failing to contain expressions of exclusion that the Congress intended that there be review. We prefer the dissent of the *Chambers* case wherein the Court stated that the Court did not have jurisdiction and that no statute of Congress granted any right in favor of anyone against the United States. We therefore conclude that Executive Order 11478 does not provide subject matter jurisdiction to plaintiff-appellant.

For the reasons stated above, the judgment of the District Court is affirmed.

Opinion of the Fourth Circuit Court of Appeals in *Koger* v. *Ball*

BUTZNER, C.J.

The narrow question presented by this appeal is whether a federal employee whose complaint of racial discrimination was pending administratively on March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972,[1] may seek judicial redress. The district court, ruling that it lacked subject matter jurisdiction to hear a complaint alleging discrimination that occurred before the effective date of the Act, and alternatively, that the complaint failed to state a claim on which relief can be granted, dismissed the employee's suit.[2] We hold that the procedural provisions of the Act embrace those complaints that were being administratively considered at the time of its enactment. Accordingly, we reverse and remand the case for further proceedings.

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[1] Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972), 42 U.S.C. § 2000e *et seq.* (1972).

[2] Other courts reaching the same conclusion include: *Hill-Vincent* v. *Richardson*, [5 EPD ¶ 8639] 359 F.Supp. 308 (N.D. Ill. 1973); *Freeman* v. *Defense Constr. Supply Center*, [5 EPD ¶ 8526] 5 FEP Cases 505 (S.D. Ohio 1972); *Moselv* v. *United States*, [6 EPD ¶ 8875] 6 FEP Cases 462 (S.D. Cal. 1973); *Palmer* v. *Rogers*, [6 EPD ¶ 8822] 6 FEP Cases 892 (D.D.C. 1973).

In contrast, however, a majority of the courts considering the problem have applied the Act retrospectively: *Walker* v. *Kleindienst*, [5 EPD ¶ 8594] 357 F.Supp. 749 (D.D.C. 1973); *Hackley* v. *Johnson*, [6 EPD ¶ 8725] 360 F.Supp. 1247 (D.D.C. 1973); *Johnson* v. *Froehlke*, [5 EPD ¶ 8638] 5 FEP Cases 1138 (D.Md. 1973); *Pointer* v. *Sampson*, [5 EPD ¶ 8610] 6 FEP Cases 9 (D.D.C. 1973); *Harrison* v. *Butz*, [5 EPD ¶ 8632] 6 FEP Cases 109 (D.D.C. 1973); *Grubbs* v. *Butz*, [6 EPD ¶ 8783] 6 FEP Cases 432 (D.D.C. 1973); *Henderson* v. *Defense Contract Admin. Region*, [7 EPD ¶ 9058] 7 FEP Cases 741 (S.D.N.Y. 1973); *Johnson* v. *Lybecker*, [7 EPD ¶ 9191] FEP Cases 279 (D. Ore. 1974); *Gautier* v. *Weinberger*, [6 EPD ¶ 9001] 7 FEP Cases 473 (D.D.C. 1973).

Opinion of the Fourth Circuit Court of Appeals in Koger v. Ball

Factual Background

I. The procedural background of this case and the facts pertinent to this appeal can be briefly stated. At all relevant times, Executive Order 11478 and its supplemental regulations were in effect. The Order reiterates the government's policy of assuring persons of all races equal opportunity to federal employment. In addition to encouraging the resolution of grievances on an informal basis, the President directed the Civil Service Commission and each department to provide for the prompt and impartial consideration of complaints of discrimination.[3]

On November 30, 1971, the appellant, O'Neal W. Koger, applied for a better paying position in the Social Security Administration where he was employed. After discovering he had not been selected for the post, he lodged a complaint alleging that he had been denied promotion because of his race. On February 22, 1972, as the first step in the grievance procedure prescribed by the regulations, he wrote a letter to the director of the bureau where he worked.[4] The director denied relief and suggested that if Koger wished to pursue his complaint he should contact an equal oppor-

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[3] Exec. Order 11478 became effective on August 7, 1969, 3 C.F.R. 803 (1966-1970 Comp.), 42 U.S.C. § 2000e note (1970). The Civil Service Regulations which implemented the Order became effective on January 1, 1971. 5 C.F.R. § 713.201 *et seq.* (1971).

The preamble to the Order states:

"It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality."

[4] Exec. Order 11478, § 4; 5 C.F.R. §§ 713.212(a) and 771.303(a) (1971).

tunity employment counselor.[5] The conferences with the counselor proved futile, so on April 28, 1972, Koger submitted a formal complaint to the Secretary of the Department of Health. Education and Welfare.[6] Since no action had been taken on the complaint by November 17, 1972, Koger's lawyer made an inquiry to the Department. On December 4, 1972, the assistant general counsel replied that the complaint was still under review, but he added that Koger could now file a civil action without further notification from the Department. Accordingly, Koger, having waited 180 days from the institution of his complaint without receiving a decision, filed this action under the 1972 Act, which had become effective the previous March while he was pursuing his administrative remedies.

APPLICABILITY OF TITLE VII

II. Although the federal government has long barred its departments and agencies from discrimination against their employees on the ground of race, judicial enforcement of this policy was uncertain and ineffective before 1972.[7] To

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[5] 5 C.F.R. §§ 713.213 and 771.303(b)(2) (1971).

[6] Exec. Order 11478, § 4; 5 C.F.R. § 771.309 (1971).

[7] *See generally, Walker* v. *Kleindienst*, [5 EPD ¶ 8594] 357 F.Supp. 749, 751 (D.D.C. 1973) (dictum).

The legislative history of the 1972 Act discloses Congress' concern with the problem.

"The prohibition against discrimination by the Federal Government, based upon the due process clause of the fifth amendment to the Constitution, was judicially recognized long before the enactment of the Civil Rights Act of 1964. [*Bolling* v. *Sharpe*, 347 U.S. 497 (1954)] And Congress itself has specifically provided that it is 'the policy of the United States to insure equal employment opportunities for Federal employees without discrimination

remedy this situation, Congress amended Title VII of the Civil Rights Act of 1964[8] by the Equal Opportunity Act of 1972,[9] which among other provisions, added a new section pertaining to government workers.[10] This section emphasizes that federal employment shall be "free from any discrimination based on race, color, religion, sex, or national origin." It refines the responsibilities and administrative procedures necessary for the departments, agencies, and Civil Service Commission "to maintain an affirmative program of equal employment opportunity," and it negates any intention to relieve government officials of their existing responsibilities "as required by the Constitution. . . . statutes [and] Executive Order 11478." Bearing directly on this case, it provides in § 717(c) that after an aggrieved employee has exhausted his administrative remedies on a complaint brought pursuant to Executive Order 11478, he

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because of race, color, religion, sex, or national origin. . . .' [5 U.S.C. § 7151 (Supp. II 1965, 1966)].

"The primary responsibility for implementing this stated national policy has rested with the Civil Service Commission, pursuant to Executive Order 11246 (1964) as clarified by Executive Order 11748.

"Despite some progress that has been made in this area, the record is far from satisfactory. Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels." H.R. Rep. No. 92-238, 92d Cong., 2d sess. (1972), 2 U.S. Code Cong. & Admin. News 2137, 2157 (1972).

[8] Pub. L. No. 88-352, 78 Stat. 253 (July 2, 1964), 42 U.S.C. § 2000e *et seq.* (1972).

[9] *See* n.1, *supra.*

[10] The Equal Employment Opportunity Act of 1972 § 717, 42 U.S.C. § 2000e-16 (1972). All subsequent section references in the text are to the Act.

may file a civil action against the head of his department or agency.[11]

The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination.[12] Section 717(c) simply created a new remedy for the enforcement of his existing right. Senator Cranston, a proponent of the legislation, explained its function as follows:

"Subsection (c) of the new section 717 creates a remedy in Federal district court—comparable to private employment actions—for any employee who has exhausted the equal employment opportunity complaint procedure within his Federal agency." [13]

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[11] Section 717(c), 42 U.S.C. § 2000e-16(c) (1972), provides:

"Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

[12] *See* nn.3 and 7, *supra*.

[13] 118 Cong. Rec. 2279 (daily ed. Feb. 22, 1972).

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Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment.[14] Of course, retrospective application is not allowed when it will work a manifest injustice by destroying a vested right.[15] But this exception plays no role here because the government has no vested right to discriminate against its employees on the basis of race.[16] The general rule has been applied to cases affected by either the enlargement or the contraction of jurisdiction even though the cause of action arose before the enactment of the statutes that changed the court's jurisdiction.[17] Mr. Justice Holmes succinctly explained why a statute, that "takes away no substantive right but simply changes the tribunal that is to hear the case, should be applied to pending cases." Retrospective application is appropriate when the statute "evinces a

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[14] In *Sampeyreac* v. *United States*, 32 U.S. (7 Peters) 222, 239 (1833), the Court said:

"[C]onsidering the Act . . . as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed."

See also Thorpe v. *Housing Authority of Durham*, 393 U.S. 268, 281 (1969); *United States* v. *Village Corp.*, 298 F.2d 816, 820 (4th Cir. 1962).

[15] *Greene* v. *United States*, 376 U.S. 149 (1964); *see Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 282 n.43 (1969) (dictum); 2 J. Sutherland, Statutory Construction § 41.09 (4th ed. 1973).

[16] *Walker* v. *Kleindienst*, [5 EPD ¶ 8594] 357 F.Supp. 749, 752 (D.D.C. 1973), *see also* nn.3 & 7, *supra*.

[17] *Federal Reserve Bank of Richmond* v. *Kalin*, 77 F.2d 50 (4th Cir. 1935) (jurisdiction enlarged); *Hallowell* v. *Commons*, 239 U.S. 506 (1916) (jurisdiction withdrawn).

change of policy" arising out of a "consideration [that] applies with the same force to all cases." [18] Though Mr. Justice Holmes spoke of the transfer of jurisdiction from the judiciary to the executive, his reasoning applies precisely to this case where we deal with the transfer of jurisdiction from the executive to the judiciary.

Section 717(c) evinces a congressional policy to make the courts the final tribunal for the resolution of controversies over charges of discrimination after all administrative remedies have been exhausted. This policy applies with equal reason to discrimination that occurred either before or after the passage of the Act when the earlier discrimination was the subject of administrative proceedings at the time of enactment. In both instances, the wrong is similar, and the requirement for exhaustion of administrative remedies is the same.

Section 717(c), read literally, applies to Koger's pending claim. It authorized him to file a civil action against the head of his department because in the language of the statute: 1) his "complaint of discrimination based on race . . . [was] brought pursuant to . . . Executive Order 11478 . . ."; 2) he waited "one hundred and eighty days from the filing of the initial charge with the department agency or unit . . ." before filing suit; and 3) he was "aggrieved . . . by the failure to take final action on his complaint." [19] Koger's complaint, therefore, states a cause of action over which the district court has jurisdiction, unless his suit is barred by an exception to the general rule governing the retrospective application of procedural statutes.

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[18] *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916).

[19] *See* n.11, *supra*.

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OBJECTIONS TO COURT JURISDICTION

III. The government advances three reasons why § 717(c) should not be applied to pending cases of discrimination. It relies primarily on a footnote in Cohen v. Chesterfield County School Board,[20] in which we said, "Rules and practices of [a public school board] in effect when the [board] was exempt from the Equal Employment Opportunity Act cannot be the basis for a violation of that Act."[21] The government contends that since it was similarly exempt until March 1972, Koger's suit, by analogy, cannot be maintained.

Cohen, however, is not controlling. There the issue concerned the validity of a school board's regulation pertaining to maternity leave. For this reason, the court's inquiry was directed to ascertaining the teacher's substantive rights. The corollary of the teacher's right was the obligation placed on the board. Obviously, during the time the board was exempt, the Act placed no obligation on it; consequently, the Act afforded the teacher no complementary right.[22] Because the footnote dealt with the board's duty

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[20] *Cohen* v. *Chesterfield County School Board*, [5 EPD ¶ 8419] 474 F.2d 395-96 n.1 (4th Cir. 1972), [7 EPD ¶ 9072] *rev'd* 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974).

[21] Similar language is contained in a footnote of the Supreme Court's opinion. *Cohen* v. *Chesterfield County School Board*, 42 U.S.L.W. 4186, 4188 n.8 (U.S. Jan. 21, 1974).

[22] Since the Act imposed no duty on the board at the time the teacher was placed on maternity leave, the Court considered her constitutional claim and held that the maternity leave regulation violated the due process clause of the fourteenth amendment. *Cohen* v. *Chesterfield County School Board*, [7 EPD ¶ 9072] 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974).

and the teacher's substantive right, it must be read in this context.

In contrast, Koger's right to be free from racial discrimination does not depend on the 1972 Act. Executive Order 11478 previously imposed a duty on the officials of his department to promote employees without regard to their race. The Act provided Koger a supplementary remedy for a violation of the existing duty defined by the Order. We conclude, therefore, that *Cohen* furnishes no precedent for dismissing Koger's complaint.

The government's second reason for avoiding retrospective application of § 717(c) is based on § 14 of the 1972 Act.[23] This section provides that amendments made to § 706 of the Civil Rights Act of 1964[24] shall be applicable to charges pending before the Economic Opportunity Commission. The government contends that § 14 indicates that only the amendments to § 706 were to be given retroactive effect, and therefore § 717(c) cannot be applied retrospective. In the leading case supporting the government, the court ruled that a federal employee's complaint of pre-Act discrimination failed to state a claim under the 1972 Act.[25] The court reasoned that § 717(c) of the Act created a "new claim" for federal employees. Since § 717(c) is not an

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[23] Section 14, 42 U.S.C. § 2000e-5 note (1972), provides:

"The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

[24] 42 U.S.C. § 2000e-5(a) to (g) (1972).

[25] *Hill-Vincent* v. *Richardson*, [5 EPD ¶ 8639] 359 F.Supp. 308 (N.D. Ill. 1973). The court, however, ruled that the complaint stated a cause of action under the fifth amendment. 359 F.Supp. at 309.

amendment of § 706, the court concluded that the "new claim" was applicable only to post-Act discrimination.

We agree that § 717(c) is not an amendment to § 706, but this does not settle the matter. The difficulty with the government's argument arises out of the failure to analyze the nature of the "new claim" the Act was said to have created. If the phrase means only a new substantive right, it is inaccurate because a federal employee's right to be free from racial discrimination existed before the passage of the 1972 Act. If it includes—as it should—a new remedy to enforce an existing right, then under the general rule favoring retrospective application of procedural statutes, § 717(c) should be applied to pending cases for the reasons mentioned in Part II.

Moreover, we find nothing in the legislative history to justify the inference that by making amendments to § 706 retrospective. Congress intended all other provisions of the Act to be prospective. The 1972 amendments to § 706 enlarged the power of the Economic Opportunity Commission and the Attorney General to deal effectively with discrimination in the private sector.[26] The House bill was silent concerning the application of the new provisions to pending charges against private employers,[27] and the Senate bill originally proposed that they should not be retroactive. However, at the request of the Justice Department, Senator Javits offered an amendment to apply the changes in § 706 to charges pending before the Commission.[28]

[26] 42 U.S.C. § 2000e-5(a) to (g) (1972).

[27] H.R. Conf. Rep. No. 92-899, 92d Cong., 2d sess., 2 U.S. Code Cong. & Admin. News 2179, 2185 (1972).

[28] 118 Cong. Rec. 2183 (daily ed. Feb. 21, 1972).

The Senate, and later the House conferees, accepted Senator Javits' amendment without any discussion about its effect on the rights of federal employees.[29] Therefore, in the absence of any indication that Congress intended to alter the general rule that procedural statutes should be applied retrospectively, the legislative history furnishes no authority for limiting the application of § 717(c) to post-Act discrimination.[30]

Finally, the government claims sovereign immunity, citing Gnotta v. United States,[31] which held that this doctrine was a defense to a complaint similar to Koger's. Assuming for the purpose of the government's argument, that *Gnotta* is correct, we nevertheless find it inapposite. *Gnotta* was decided before the passage of the 1972 Act, and consequently it presented no occasion for considering whether § 717(c) should be applied retroactively to abrogate the doctrine with respect to pending complaints of racial discrimination. Clearly, Congress gave its consent for suits to redress discrimination occurring after passage of the Act. Whether this consent extends to pending cases of pre-Act discrimination depends on the propriety of retrospective application of the Act. Thus, the government's plea of sovereign immunity does not resolve the issue; it simply restates the question in different words.

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[29] *See* nn.27 and 28, *supra*.

[30] "Unless a contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases." 2 J. Sunderland, Statutory Construction § 41.09 at 281 (4th ed. 1973).

[31] *Gnotta* v. *United States*, [2 EPD ¶ 10,078] 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); *accord*, *Manhattan-Bronx Postal Union* v. *Gronouski*, [52 LC ¶ 16,704] 350 F.2d 451 (D.C. Cir. 1965).

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The only condition precedent to suit that Congress created was the exhaustion of administrative remedies, including those remedies that Executive Order 11478 made available both before and after the passage of the Act. Since Koger's pending case satisfied this condition precedent, the express language of § 717(c) authorizes him to seek judicial relief.[32] In this respect, he stands in the same position as an employee who exhausted his administrative remedies for a claim of post-Act discrimination. Therefore, no rational purpose is served by invoking the doctrine of sovereign immunity to bar judicial adjudication of Koger's complaint simply because his pending case involved pre-Act discrimination.[33] We conclude that Congress, being fully aware of the general rule favoring retrospective application of procedural statutes, intended by enacting § 717(c) to grant employees consent to sue for redress of pending cases of pre-Act discrimination.[34]

The judgment is reversed, and the case is remanded for further proceedings.

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[32] *See* n.11, *supra*.

[33] Congressional intention to abolish the defense of sovereign immunity is disclosed in S. Rep. No. 92-415, 92d Cong., 1st Sess. 16 (1971):

"An important adjunct to [administrative] responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

" . . . [T]he committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity . . . The provisions adopted by the committee will [afford] . . . employees . . . the full rights available in the courts as are granted to individuals in the private sector under Title VII."

[34] *Henderson* v. *Defense Contract Admin. Region*, [7 EPD § 9058] 7 FEP Cases 241, 242 (S.D.N.Y. 1973).